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No. 05-

IN THE

Supreme Court of the United States

PAUL ALFRED BIEN-AIMÉ,

Petitioner,

v.

ALBERTO R. GONZALES,
Attorney General of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in denying Petitioner's petition to review the Board of Immigration Appeal's order denying him asylum and withholding of removal.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Paul Alfred Bien-Aimé and Respondent Alberto R. Gonzales, Attorney General of the United States of America.

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Petitioner Paul Alfred Bien-Aimé respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unofficial report of the unpublished decision of the United States Court of Appeals for the Fourth Circuit (1a-3a)[1] is available at 121 Fed. Appx. 524, 2005 WL 348366, 2005 U.S. App. LEXIS 2124 (4th Cir. Feb. 9, 2005).

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit was entered February 9, 2005. The order denying Bien-Aimé's petition for rehearing and rehearing en banc was entered on April 19, 2005. (18a-19a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

> The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a

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1. Numbers followed by an "a" refer to pages in the Appendix submitted with this Petition. Numbers preceded by "J.A." refer to pages in the Joint Appendix submitted to the Court of Appeals.

> refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1158(b)(1).

> The term "refugee'" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A).

> [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1231(b)(3)(A).

The regulation 8 C.F.R. § 1208.13, cited in the Fourth Circuit's opinion, is reprinted in the Appendix to this Petition. (20a-26a.)

STATEMENT OF THE CASE

Bien-Aimé Flees Haiti

Paul Alfred Bien-Aimé, a member of the Democratic Convergence Party, fled Haiti after armed gunmen from the Lavalas Party sought him out at home and then tore down his house. (J.A. 37, 341-42.) Bien-Aimé was returning from a Convergence meeting that he attempted to attend (J.A. 339-40), but he had been turned back by Lavalas supporters firing on Convergence members (J.A. 37, 340-41). After hiding for a few weeks, Bien-Aimé used a passport with his photograph but bearing the name "Jean Claude Santil" to escape Haiti and seek refuge in the United States. (J.A. 38, 361.)

On May 3, 2001, Bien-Aimé entered the United States at Miami International Airport where an INS inspector rejected the passport Bien-Aimé had used to flee Haiti. Bien-Aimé recounted to this inspector the events surrounding his persecution in Haiti. (J.A. 5-9.)

On May 8, 2001, an INS asylum officer conducted a credible fear interview. (J.A. 15-21.) The one-paragraph narrative in the government's record states that,

> In April 2001, I was returning home from the Convergence Party office in Port-au-Prince where I had been attending a meeting, then people from the Lavalas Party were in the street shooting at people in the Convergence Party like me. Then I had to duck down on the ground, and then ran home. When I arrived home, my wife told me that three men with weapons had come looking for people who were not in Lavalas. Then she told

> me that I should go into hiding to escape from such people, so I went into hiding in Tabbare until I left Haiti, which was about 22 days. My wife did not tell me anything else. I was a member of Convergence Party since the May 21st 2000 elections. I joined because in Haiti, everyone has to choose a party, so I choose this one. I did not have any problems in Haiti before this.

(J.A. 17.) Based on this interview, the INS concluded that Bien-Aimé established a "[c]redible fear of persecution," that he "does not appear to be subject to a bar(s) to asylum or withholding of removal," and that "[t]here is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing." (J.A. 18.)

Bien-Aimé thereafter applied for asylum, *see* 8 U.S.C. § 1158(b)(1), and withholding of removal, *see* 8 U.S.C. § 1231(b)(3)(A).[2]

The Immigration Court

At the asylum hearing before the Immigration Court, the government's counsel stated that she did not doubt the

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2. The Immigration Court had subject matter jurisdiction over Bien-Aimé's application for asylum and withholding of removal. 8 C.F.R. § 1003.14. Immigration Judge Joan V. Churchill issued her decision on February 12, 2003, and Bien-Aimé timely appealed to the Board of Immigration Appeals, which had subject matter over the appeal from the Immigration Court. 8 C.F.R. § 1003.1(b). The Fourth Circuit had jurisdiction over this matter because Bien-Aimé timely filed his petition for review on June 15, 2004, within 30 days of the final order of the Board. 8 U.S.C. § 1252(a)(1).

veracity of Bien-Aimé's account of persecution even before Bien-Aimé testified. (J.A. 334.) In her closing statement following Bien-Aimé's testimony, the government's counsel stated that she had no concern about the sincerity of the asylum application and assured the Immigration Court that the INS would not appeal a grant of asylum. (J.A. 370.)

Immigration Judge Joan V. Churchill concluded that Bien-Aimé "has been consistent in [his] claim" of persecution (6a) and that "there has been a climate of violence involving different political forces in Haiti for many years" (9a; *see* 7a-9a) of the sort described by Bien-Aimé.

In spite of the government not opposing a grant of asylum and in spite of finding the very conditions Bien-Aimé experienced, Immigration Judge Churchill denied his application for asylum and withholding of removal on the basis of an adverse credibility finding. (9a.) Immigration Judge Churchill referred to what she considered "inconsistencies," including: Bien-Aimé correcting himself about the dates on which he attended or attempted to attend a Convergence meeting (12a; *see* J.A. 362); Bien-Aimé not describing what he did to join the Convergence party (10a) in spite of his testimony about how he had done just that (*id.* ("[h]e claims that he was registered as a member . . . or that his name was written in a book"); 13a ("his name was written down")); Bien-Aimé not providing physical evidence that he was a member of the Convergence party (10a); and Bien-Aimé testifying that he experienced violence *on the way to* a Convergence meeting in April 2001 while the asylum office reported that he saw violence *on his way home from* the April meeting (12a-14a).

The Board of Immigration Appeals

The government did not oppose Bien-Aimé's appeal to the Board of Immigration Appeals.

On May 17, 2004, in a one-paragraph decision (15a-17a), the Board affirmed the Immigration Court's ruling. Rather than base its decision on the Immigration Court's findings, however, the Board arrived at its own adverse credibility determination. In particular, the Board held that "[t]here are discrepancies between the respondent's testimony, his Form I-589, and his credible fear interview regarding the events that occurred in April 2001 . . . for which the respondent has failed to provide a convincing explanation on appeal." (15a-16a.)

First, according to the Board, Bien-Aimé wrote in his asylum application that "the Lavalas supporters shot at and threw rocks at Convergence Party supporters while he was traveling to a Convergence Party meeting" but "that the Lavalas Party supporters were only brandishing guns and burning tires while he was on his way home." (16a.) Bien-Aimé testified before the Immigration Court "that a crowd of alleged Lavalas supporters shot at and threw rocks at Convergence Party supporters while he was traveling to and from a Convergence Party meeting." (*Id.*) However, the government's credible fear interview report only mentioned "violence that occurred on his way to the Convergence Party meeting," and "that the Lavalas Party supporters shot at the Convergence Party supporters while he was on his way home from the meeting." (*Id.*)[3]

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3. The Board ignored that Bien-Aimé had corrected the assertion in the government's credible fear interview in his asylum application. Bien-Aimé noted that the government's record "incorrectly indicates that I was returning home from the meeting." (J.A. 37 n.3.)

Second, Bien-Aimé wrote in his asylum application and testified before the Immigration Court that he was unable to reach the building where a Convergence Party meeting was to be held in April 2001 because of violence against the Convergence members, but during his "credible fear interview, he stated that he had attended a Convergence Party meeting in April 2001." (*Id.*)

Third, according to the Board, Bien-Aimé wrote in his asylum application and testified before the Immigration Court that "he saw the Lavalas Party members tear down his home, but he failed to mention the destruction of his home during his credible fear interview." (*Id.*)

The Fourth Circuit

In a per curiam order, the Fourth Circuit found that "substantial evidence supports the conclusion that Bien-Aimé failed to establish the past persecution or well-founded fear of future persecution necessary to establish eligibility for asylum" and, as a result, he also cannot satisfy "the higher standard necessary for withholding." *Bien-Aimé v. Ashcroft*, No. 04-1743, 121 Fed. Appx. 524, 2005 WL 348366, 2005 U.S. App. LEXIS 2124 (4th Cir. Feb. 9, 2005). (1a-3a.) The panel stated that it relied on "the administrative record, the immigration judge's decision, and the Board's order" (2a), but did not cite any statement of fact or legal reasoning from that record, decision, and order.

On April 19, 2005, the Fourth Circuit denied Bien-Aimé's petition for a rehearing or rehearing en banc. (18a-19a.)

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION WARRANTS REVIEW BECAUSE IT CONFLICTS WITH PRECEDENT FROM OTHER COURTS OF APPEALS

The Fourth Circuit's decision conflicts with precedent of other Courts of Appeals. Bien-Aimé relied on cases from various Courts of Appeals in support of his petition for review to the Fourth Circuit. Respondent argued in response, however, that "the law of those other Circuits does not apply" in the Fourth Circuit. (Resp. Br. at 21.) The Fourth Circuit upheld the Board's denial order denying him asylum and withholding of removal and apparently adopted the Board's reasoning.

1. The Board decision on which the Fourth Circuit relied concluded that omissions and discrepancies in the testimony and government reports formed the basis of an adverse credibility determination. The Ninth Circuit, however has held that a mere omission is not a "discrepancy" or "inconsistency" on which an adverse credibility finding may be based. *See Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (explaining that an omission is not the equivalent of an inconsistency); *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996) ("[T]he omission of details from an applicant's earlier testimony cannot serve as the basis for an adverse credibility finding."); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) ("If minor inconsistencies or misrepresentations of unimportant facts cannot constitute the

basis for an adverse credibility finding, *a fortiori* minor omissions cannot.").

2. a. Courts of Appeals for the First, Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits have held that minor discrepancies may not form the basis of an adverse credibility determination in an asylum proceeding. *See, e.g., Sylla v. INS*, 388 F.3d 924, 926 (6th Cir. 2004); *Kaur v. Ashcroft*, 379 F.3d 876, 884 (9th Cir. 2004); *Camara v. Ashcroft*, 378 F.3d 361, 368-69 (4th Cir. 2004); *Uwase v. Ashcroft*, 349 F.3d 1039, 1042-44 (7th Cir. 2003); *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (holding that minor discrepancies that do not "involve the heart of the asylum claim" are not an adequate basis for an adverse credibility finding) (quotation omitted); *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000) ("If discrepancies cannot be viewed as attempts by the applicant to enhance his claims of persecution, they have no bearing on credibility.") (quotation omitted); *Cordero-Trejo v. INS*, 40 F.3d 482, 487-88 (1st Cir. 1994); *Diallo v. INS*, 232 F.3d 279, 288 (2d Cir. 1990) ("Where an applicant's testimony is generally consistent, rational, and believable, disparities . . . need not be fatal to credibility, especially if the errors are relatively minor and isolated, and do not concern material facts.") (citation omitted); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382-83 (9th Cir. 1990).

b. In particular, minor omissions or discrepancies based on a government record of its interview of the asylum-seeker upon arrival in the United States do not justify an adverse credibility finding. *See, e.g., Ememe v. Ashcroft*, 358 F.3d 446, 451-53 (7th Cir. 2004); *Dia v. Ashcroft*, 353 F.3d 228, 257 (3d Cir. 2003); *Mulanga v. Ashcroft*, 349 F.3d 123,

137-38 (3d Cir. 2003); *Zubeda v. Ashcroft*, 333 F.3d 463, 476-77 (3d Cir. 2003); *Singh v. Ashcroft*, 292 F.3d 1017, 1021-24 (9th Cir. 2002); *Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998) ("By placing too much reliance on an airport interview . . . the INS seriously undermined the reliability of the administrative process."); *Balasubramanrim v. INS*, 143 F.3d 157, 161-63 (3d Cir. 1998).

The *Balasubramanrim* Court, which has been subsequently followed by several Courts of Appeals, listed several factors that question the completeness of government credible fear interviews:

(1) an airport interview lacks reliability if it is not clear "how the interview was conducted" and "how the document was prepared";

(2) "the airport statement is not an application for asylum" and the questions posed often are "not designed to elicit the details of an asylum claim";

(3) an asylum-seeker who is fleeing political persecution at the hand of the government "in his home country may be reluctant to reveal . . . information during the first meeting with government officials in this country;" and

(4) "when the arriving alien is not proficient in English and no translator is provided, the airport interview may not elicit all the events which are central to an asylum claim."

143 F.3d at 162-63. After analyzing these factors, the Third Circuit concluded: "That there were some inconsistencies between the airport statement and Balasubramanrim's testimony before the immigration judge is not sufficient, standing alone, to support the Board's finding that Balasubramanrim was not credible." *Id.* at 164.

3. Here, the Fourth Circuit, in adopting the Board's decision, departs from other Courts of Appeals and even its own precedent. *See Camara v. Ashcroft*, 378 F.3d 361, 368-69 (4th Cir. 2004) (concluding, in part, "that several of the 'discrepancies' fail to support the [Immigration Judge's] finding on credibility"). The government's Credible Fear Worksheet (J.A. 15-21) omitted facts that that Bien-Aimé—who spoke little or no English—later supplied in his asylum application (*see, e.g.*, J.A. 36 n.1 & 2; J.A. 37 n.3). In his application, Bien-Aimé noted that the government "incorrectly indicates that I was returning home" from a Convergence meeting (J.A. 37 n.3); in fact, politically-motivated violence prevented him from actually attending the meeting, and he encountered such violence both on his way to and from the meeting place. According to his application,

> In April 2001, I was going to the Convergence Party office in Port-au-Prince, Haiti, where I was to attend a Convergence Party meeting. Gunmen from the Lavalas Party were in the streets shooting at people in the Convergence Party like me. I had to duck down to avoid the shooting. I ran to my home on Rue Sainte-Claire, Port-au-Prince.
>
> On the way home, I saw Lavalas supporters in the streets brandishing guns and burning tires. I also

> saw them capturing members of the Convergence Party. I had to run through the alleys between houses to avoid these Lavalas supporters.

(J.A. 37 (paragraph numbers omitted).) Nevertheless, the Board's decision on which the Fourth Circuit relied pointed to the government's report of the credible fear interview that Bien-Aimé successfully attended a Convergence meeting in April 2001 and that he experienced political violence *on his way from* the meeting but did not mention violence encountered *on the way to* the meeting.

4. Bien-Aimé consistently claimed in his asylum application and at his Immigration Court hearing that Lavalas supporters tore down his house. The government, however, did not include this point in its report, either because it failed to do so or because Bien-Aimé did not relay this detail in the initial interview. Even without this detail, however, the INS concluded that Bien-Aimé established a "[c]redible fear of persecution." (J.A. 18.) In any event, as discussed above, the mere omission of this detail in the government's report provides no basis to infer any discrepancy. Nevertheless, the Board's decision on which the Fourth Circuit relied used this omission as a basis for doubting Bien-Aimé's credibility. (16a.)

5. a. The Board's adverse credibility finding is based minor errors by the government that Bien-Aimé corrected in his asylum application. Errors in a report that the government prepared—which errors Bien-Aimé corrected at his first opportunity—do not constitute "discrepancies" at all, let alone discrepancies that support an adverse credibility finding. Bien-Aimé should not now be punished for details

that were omitted in the government's preliminary report or that were never asked by government agents.

b. Affirming the Board's finding based on an omission in a government report would punish Bien-Aimé for later giving more details to substantiate his asylum claim than are in the government's own meager statement. In addition, it would render moot any need to elicit additional facts in an asylum application beyond those the government reports in an interview on arrival in this country. Adopting such a policy would leave an asylum applicant in a perilous dilemma: if he does not say more than what the government reported in its record of the credible fear interview, then he may not present sufficient evidence to substantiate his claim, and if he says more, then the resulting "omission" in the government's report may serve as a basis for an adverse credibility determination.

c. To the extent that the government errors or omissions are attributed to Bien-Aimé as inconsistencies, they are all so minor that they may not form the basis of an adverse credibility finding. The alleged "discrepancy" between Bien-Aimé's testimony that "Lavalas supporters shot at and threw rocks at Convergence Party supporters while [Bien-Aimé] was traveling to and from a Convergence Party meeting" (16a) and the asylum application, which states that "the Lavalas Party supporters were only brandishing guns and burning tires while [Bien-Aimé] was on his way home" (*id.*), is too minor and immaterial to question credibility.

6. Bien-Aimé cited cases from Courts of Appeals for the Third, Seventh, and Ninth Circuits, among others, in support of his claims that minor omissions or discrepancies do not justify an adverse credibility finding. In response,

Respondent asserted that "the law of those other Circuits does not apply here" (Resp. Br. at 21), thus signaling a conflict between the Fourth Circuit and other Courts of Appeals. But federal law as applied to asylum-seekers ought not vary among the Courts of Appeals. Bien-Aimé's case should be decided in harmony with the precedent from the various Courts of Appeals and not in conflict with them.

7. The Board's decision on which the Fourth Circuit relied ultimately did not "offer a specific, cogent reason" to disbelieve Bien-Aimé based on these purported minor omissions and discrepancies. *Camara*, 378 F.3d at 367; *Figeroa*, 886 F.2d at 78; *see Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004) ("The BIA failed to follow well-established law when it did not clarify why this purported discrepancy was significant enough to justify an adverse credibility decision."). Instead, the Board faulted Bien-Aimé for failing "to provide a convincing explanation on appeal" of a "discrepancy" the Board raised for the first time. (16a.) The Board, thus, attempted to shift its burden of providing specific, cogent reasons showing lack of credibility to Bien-Aimé to prove credibility in anticipation of issues the Board may raise.

II. CHRONIC PROBLEMS WITH DECISIONS FROM THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS WOULD BENEFIT FROM AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS OVER THE COURTS OF APPEALS' TREATMENT OF THESE DECISIONS

1. a. Bien-Aimé's case is an example of chronic problems with the questionable reasoning of decisions from the Immigration Courts and the Board of Immigration

Appeals. *See, e.g., Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1187, 1193 (9th Cir. 2005) (criticizing an Immigration Judge for a ruling that is "literally incomprehensible" and "extreme in its lack of a coherent explanation"); *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (collecting cases from the Second, Seventh, Eighth, and Ninth Circuits that suggest "a pattern of serious misapplications by the board and the immigration judges of elementary principles of adjudication"); *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) ("The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases."); *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003).

b. These problems largely result from Respondent's decision in 2002 to reduce the size of the Board of Immigration Appeals, limit the number of three-judge panels on the Board, and accelerate the speed of the decisions, resulting in a deluge of petitions to the Courts of Appeals. *See* Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, Los Angeles Times, May 2, 2005, at A1; Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Continue to Overwhelm Federal Courts*, The Legal Intelligencer, Jan. 19, 2005, at 7; Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing: Hundreds of Lawyers Being Reassigned to Deal With More Than 4,000 Appeals in New York City*, Washington Post, Dec. 14, 2004, at A11; Tom Perrotta, *Immigration Appeals Surge in Second Circuit*, New York Law Journal, Nov. 4, 2004, at 1; Claire Cooper & Emily Bazar, *Immigration Appeals Swamp Federal Courts*, Sacramento Bee, Sept. 5, 2004, at A1.

c. Theses problems are further exacerbated by the wide range of outcomes that appear to depend on which Immigration Judge is assigned initially to a case. Even before Respondent's efforts to accelerate immigration decisions, among Immigration Judges who have considered more than 250 cases, "[o]nly 20 judges granted asylum in more than 30% of their cases, while 69 judges approved fewer than 10% of the asylum cases." Lisa Getter, *A Man's Asylum Fight in the Land of the Free: His 642-Day Journey Through the Backlogged Immigration Court Could Happen Anywhere and Calls Into Question "Justice for All,"* Los Angeles Times, Apr. 15, 2001, at A1. One Immigration Judge who considered 1,112 asylum cases, granted asylum to over 48% of applicants; another who considered 2,273 asylum cases granted asylum to 42.5% of applicants. *Id.* At the other end of the spectrum, one Immigration Judge who considered 2,045 asylum cases granted asylum to 1.3% of applicants; another who considered 2,050 asylum cases granted asylum to 1.4% of applicants. *Id.*

d. All of these problems have created a situation of national importance in the treatment of asylum-seekers that would benefit from an exercise of this Court's supervisory powers in this case.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Dated: July 15, 2005

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED FEBRUARY 9, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1734

PAUL ALFRED BIEN-AIME,

Petitioner,

versus

JOHN ASHCROFT, Attorney General of the United States,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. (A79-400-017)

Submitted: January 19, 2005 Decided: February 9, 2005

Before NIEMEYER, MOTZ, and DUNCAN, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Scott H. Christensen, HUGHES HUBBARD & REED, L.L.P., Washington, D.C., for Petitioner. Peter D. Keisler, Assistant Attorney General, Donald E. Keener, Appellate Deputy, Greg D. Mack, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. for Respondent

Appendix A

PER CURIAM:

Paul Alfred Bien-Aimé, a native and citizen of Haiti, petitions for review of the Board of Immigration Appeals's (Board) order denying him asylum and withholding of removal.

We will reverse the Board only if the evidence " 'was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution.' " *Rusu v. INS*, 296 F.3d 316, 325 n.14 (4th Cir. 2002) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)). We have reviewed the administrative record, the immigration judge's decision, and the Board's order and find substantial evidence supports the conclusion that Bien-Aimé failed to establish the past persecution or well-founded fear of future persecution necessary to establish eligibility for asylum. *See* 8 C.F.R. § 1208.13(a) (2004) (stating that the burden of proof is on the alien to establish eligibility for asylum); *Elias-Zacarias*, 502 U.S. at 483 (same).

Next, we uphold the Board's denial of Bien-Aimé's application for withholding of removal. The standard for withholding or removal is "more stringent than that for asylum eligibility." *Chen v. INS*, 195 F.3d 198, 205 (4th Cir. 1999). An applicant for withholding must demonstrate a clear probability of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). As Bien-Aimé failed to establish refugee status, he cannot satisfy the higher standard necessary for withholding.

Appendix A

Accordingly, we deny Bien-Aimé's petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

APPENDIX B — ORAL DECISION OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT DATED FEBRUARY 12, 2003

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Arlington, Virginia

February 12, 2003

File No.: A 79 400 017

In the Matter of

PAUL ALFRED BIEN-AIME,
a/k/a JEAN CLAUDE SAINTIL,

Respondent

IN REMOVAL PROCEEDINGS

CHARGES:	Section 212 (a) (6) (C) (I) – attempt to obtain admission to the United States by fraud or willful misrepresentation.
	Section 212 (a) (7) (A) (i) (I) – immigrant no immigrant visa.
APPLICATIONS:	Asylum, withholding of removal under Section 241 (b) (3).

Appendix B

ON BEHALF OF RESPONDENT:

Scott Christensen, Esquire
Craig Forcese, Esquire
Hughes Hubbard & Reed
1775 I Street NW
Washington, D.C. 20006-2401

ON BEHALF OF SERVICE:

Claudia Flower, Esquire
Assistant District Counsel
4420 North Fairfax Drive
Suite 500
Arlington, Virginia 22203

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a married, male alien, 41 years of age who is a native and citizen of Haiti. He came to the United States presenting a photo-substituted passport of another person on May 3, 2001. He was not admitted, and these proceedings followed. The respondent has conceded that he is subject to removal as charged on both grounds.

During the course of these proceedings, the respondent filed an application for asylum, Form I-589. The application is also deemed to be an application for withholding of removal. Section 208 of the Immigration and Nationality Act provides for asylum for persons who fit the definition of refugee. A refugee is defined in the Act as an alien unwilling to return to his or her country of nationality because of

persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 241(b)(3 of the Act mandates withholding of removal from a country where an alien's life or freedom is threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. A clear probability of persecution must be shown to qualify for withholding of removal. *INS v. Stevic*, 467 U.S. 407 (1984). A well-founded fear of persecution is something less than that, a clear probability thereof. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). A well-founded fear of persecution is established if a reasonable person in the circumstances would fear persecution. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

The respondent claims that he fears persecution by supporters of the Lavalas Party in Haiti. He has been consistent in this claim. When he arrived in the United States and was questioned at the airport, when asked what his purpose was in attempting to enter the United States, he answered "the members of the 'Lavalas Party' are trying to kill me because of political reasons." That statement was given at the airport on May 3, 2001. See Exhibit 3, page 2. During a credible fear interview with an asylum officer, the respondent testified that in April 2001 when he was returning home from a Convergence Party office in Port-au-Prince where he had been attending a meeting, people from the Lavalas Party were on the street shooting at people in the Convergence Party like himself. He testified that he ran home, and when he arrived home his wife told him that three men with weapons had come looking for people who were not in

Lavalas. He testified that he had joined the Convergence Party in May 2000. See Exhibit 4, page 3, and interview notes 3.1.

The background material here indicates that there is ongoing violence in Haiti involving the Lavalas Party and members of the Lavalas Party and other parties. The background material indicates that violence is out of hand in that there is a considerable amount of violence, and the government has not made progress solving prominent killings that took place after the Lavalas Party, referred to as the FL Party in the report, regained power in 1994. See Exhibit 7-A, page 2. The report indicates that "FL local officials committed increasing numbers of serious human rights abuses." *Ibid.* Vigilante violence is described in the report. A statement by the president of Haiti that "suspected criminals would be met with 'zero tolerance' " is cited in connection with the vigilante killing. See Exhibit 7-A, page 2 and following. "In his address he called on police and citizens to bypass the judicial system if they caught persons in the act of committing a crime." Exhibit 7-A at page 3. "The government's record of disciplining police officers . . . is inconsistent." *Ibid* at page 5. The report mentions "that political violence stemming from controversial results of May 2000 legislative and local elections continued during the year." The year referenced is the year 2001.

According to the U.S. State Department it was also reported that the elections were manipulated to ensure that the Lavalas Party maintained control of the senate. "The opposition parties boycotted July 2001 run-off elections and the November 2000 presidential elections, in which Jean-Bertrand Aristide was elected with extremely low voter

turnout." Exhibit 7-A, page 1. Judges have been beaten who attempted to investigate actions of mayors and the detention and beating of opposition members in July 2000. Exhibit 7-A, page 9.

The U.S. State Department has issued press statements about violence in Haiti. One is dated December 4, 2002, and states "the United States is deeply concerned about violent demonstrations that have taken place in Haiti over the past two weeks . . . the government of Haiti must act now to fulfill its commitments under the resolution [OAS 822], most notably to restore a climate of security. For their parts, Convergence, Democratique, other opposition parties, and civil society must play a constructive and responsible role in moving forward under resolution 822 and in fostering an environment that promotes political reconciliation for all Haitians." Exhibit 7-D. An earlier press statement dated August 5, 2002, states "the United States is deeply concerned by violence in the Haitian city of Gonaives. In recent days, armed street gangs and members of local political groups known as 'popular organizations' have blocked roads and assaulted government facilities and vehicles . . . the violent actions of 'popular organizations' and street gangs are deplorable. We call upon the government of Haiti to take all necessary steps to restore order and the rule of law in the city of Gonaives."

Amnesty International has called for political leaders in Haiti to reject violence. See Exhibit 8. Considerable other material in the record describes the history of violence which has engulfed Haiti for many years. See Exhibit 12, reports of Human Rights Watch; see Exhibit 13, series of newspaper articles.

Thus, this is a case in which there has been a climate of violence involving different political forces in Haiti for many years. One issue presented in this case is whether we are dealing with a case involving lawlessness rather than persecution. That can be a difficult issue in determining where to draw the line.

An applicant for asylum and withholding of removal has the burden to establish that he is submitting a truthful application. In this case, we are not convinced by the credibility of the respondent's application. We are aware that he has been consistent in making the general statement that he fears violence from Lavalas supporters. However, we are not convinced that the facts he claims are truthful.

The respondent claims that he joined the Convergence Party in 2000 "soon after attending my first meeting." He claims that he attended a meeting of Convergence in February of 2000. He also testified that he attended a meeting of Convergence in April 2001 and that that was the only meeting he attended. When being confronted with the discrepancy with the earlier statement, he changed the testimony to say that the meeting he attended was in February of 2000. He testified that it was at the headquarters of the Convergence organization. The respondent seems to know little about the Convergence organization. He describes himself as politically not savvy. He was not aware that it was a federation of opposition parties. The fact that it is a federation of political parties is described in the background materials. The respondent was unable to describe what took place at the one meeting he attended other than to say that it was cancelled after an hour. He testified that there were several speakers at

that meeting but that he cannot describe anything that the speakers said during the meeting he allegedly attended.

The respondent has absolutely no evidence that he is a member of any political party. He claims that he was registered as a member upon arriving or that his name was written in a book as attending a meeting, which he says that he attended in February 2002 [later changed to February 2000] but he has no documentary evidence that he attended any meeting or that he was registered with that party in any way.

The respondent's testimony is illogical.

According to the respondent's story, which has changed in some details, there is some discrepancy; the respondent today claims that he was on his way to a Convergence Party headquarters in April of 2001 when he saw violence in the streets. He claims that he saw armed people shooting at people in the meeting, so he was unable to get into the building and ducked down a side street. He saw violence on the side streets. He described the violence as people throwing rocks and burning tires. He then went home. He claims that when he got home his wife told him that people had been by his house asking for "Boss Alfred." The respondent testified that he is known as Boss Alfred. According to the respondent, his wife told these individuals that the respondent had gone to a Convergence meeting and that they said they would be back. She urged her husband to leave, and he left the home. He went off to a hill where he saw his house being attacked and destroyed. Thereafter he stayed with neighbors or friends in another neighborhood. He visited with his wife and

children on occasion. A person who owed him money named Jean helped the respondent make arrangements for the smuggler. The respondent sold a cow and borrowed some money which he paid to the smuggler. The smuggler then, with a photograph from the respondent, presented the respondent with the photo-substituted passport which the respondent used to travel to the United States. According to the respondent, he does not know how much money was paid to the smuggler, although he seems to have been the one who paid money to the smuggler. He claims that his friend Jean took care of everything, but he then describes that the smuggler asked for more money and that they had to return several times. The respondent sold a cow to raise money and borrowed some money to cover the amount requested by smuggler.

The respondent has submitted a letter from his wife. He testified that she lacks schooling and cannot write and that the letter was dictated to another person. See Exhibit 9-A. He identified her name at the bottom of it.

What is particularly illogical here is the respondent's claim that he has a reasonable belief that armed individuals were looking for him in April 2001 to harm him because he had attended a meeting of the Convergence Party in the past. This happened to be the very time that the respondent had for the second time gone to attend the meeting. The respondent testified that it was known that he had attended a prior meeting of the Convergence Party and therefore was a Convergence supporter because he had been seen at the prior meeting. He testified he believes he may have been seen at that meeting by persons who belonged to the Lavalas Party.

He testified that about 500 to 700 people were at that earlier meeting. While the respondent described himself as having joined the Convergence Party shortly after that meeting, he does not describe what he did to join the Convergence Party. The fact that he was at a meeting where some of the other people attending were Lavalas members does not establish that he would have been identified as a supporter of the Convergence organization. Obviously, members of Lavalas or Lavalas supporters were attending that meeting as well.

There is an important discrepancy here about the time frame given that the respondent was inconsistent about whether the prior meeting he had attended was in February 2000 or February 2001. He testified that the meeting that he tried to attend in April 2001 was two months after the prior one, but then he testified, when confronted with the discrepancy, that it was a year and two months later. It seems entirely improbable that members of Lavalas would have been coming to harm the respondent a year and two months after he attended a meeting which they had supporters attend also. The respondent testified that people who were Lavalas supporters, who were armed, were not people that he knew in any way. It does not seem at all probable that the respondent's account is truthful. The respondent's testimony regarding his political activities is vague and, as mentioned, contains discrepancies.

His sworn statement to the asylum office was that he saw the violence on the way home from the April meeting. In connection with this hearing, he claims that the violence was while he was en route to the meeting. This is an important discrepancy. The respondent has not been precise about when

this meeting was or where. According to what he told the asylum office, he joined the Convergence organization in May of 2000. This is after he allegedly went to the meeting in February 2000 where his name was written down. As mentioned, there has been no explanation of what action he took to join the organization in May of 2000 or any other time. He testified he has no paperwork, no evidence of membership.

Given the discrepancies here, given the vagueness in the respondent's testimony, we find that we cannot believe that the respondent has not just cited the problems, the violence in Haiti, in order to try to win asylum in the United States. In view of the fact that we make an adverse credibility finding and in as much as we are not convinced by the credibility of the respondent's story, we do not need to evaluate whether what he described would fit the concept of persecution if it truly happened or if it would merely fit the concept of general violence and lawlessness, which would not qualify for asylum. We do note that the cases have held that not all forms of harm constitute a basis for a fear of persecution, and that general upheaval in a community is not a basis for a grant of asylum or a claim of persecution. *M-A- v. INS*, 899 F.2d 304 (4th Cir. 1990).

Inasmuch as the respondent is an arriving alien, there is no other relief for which we can consider him, other than the asylum or withholding applications.

Appendix B

ORDER

IT IS ORDERED that the respondent's applications for asylum and withholding of removal under Section 241(b)(3) be and they are hereby denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to the country whence he came, which is Haiti.

/s/ Joan Churchill
JOAN CHURCHILL
Immigration Judge

APPENDIX C — DECISION OF THE BOARD OF IMMIGRATION APPEALS OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED MAY 17, 2004

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79-400-017 - ARLINGTON

In re: BIEN-AIME, PAUL ALFRED*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Scott H. Christensen

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated February 12, 2003. On appeal, the respondent asserts that the Immigration Judge improperly denied his application for asylum and withholding of removal (Form I-589) pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and request for protection under the Convention Against Torture. 8 C.F.R. §§ 1208.16-18. We disagree. The Immigration Judge correctly found that the respondent was not credible. There are discrepancies between

the respondent's testimony, his Form I-589, and his credible fear interview regarding the events that occurred in April 2001 which are indeed present in the record of proceeding and for which the respondent has failed to provide a convincing explanation on appeal (I.J. at 10). See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998). Specifically, the respondent testified that a crowd of alleged Lavalas supporters shot at and threw rocks at Convergence Party supporters while he was traveling to and from a Convergence Party meeting (Tr. at 40-43). However, in the respondent's credible fear interview, he failed to mention any violence that occurred on his way to the Convergence Party meeting. Rather, he stated that the Lavalas Party supporters shot at the Convergence Party supporters while he was on his way home from the meeting (Exh. 4). In addition, the respondent wrote in his Form I-589 that the Lavalas supporters shot at and threw rocks at Convergence Party supporters while he was traveling to a Convergence Party meeting, but he wrote that the Lavalas Party supporters were only brandishing guns and burning tires while he was on his way home (Exh. 6). In addition, we note the following additional discrepancies that supports the Immigration Judge's adverse credibility finding. In the respondent's credible fear interview, he stated that he had attended a Convergence Party meeting in April 2001, but, during his individual hearing, he testified that he was unable to reach the building where the meeting was being held and returned home (Exh. 4; Tr. at 54). Finally, we note that in the respondent's Form I-589 and during his testimony, he provided that he saw the Lavalas Party members tear down his home, but he failed to mention the destruction of his home during his credible fear interview (Exhs. 4, 6; Tr. at 42). Based

on the foregoing, we find that the respondent has not presented a credible claim. Accordingly, the appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 19, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED
April 19, 2005

No. 04-1734
A79-400-017

PAUL ALFRED BIEN-AIME

Petitioner

v.

JOHN ASHCROFT, Attorney General of the United States

Respondent

On Petition for Rehearing and Rehearing En Banc

The petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix D

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Motz, Judge Niemeyer, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E — CODE OF FEDERAL REGULATION 8 C.F.R. § 1208.13

§ 1208.13 Establishing asylum eligibility.

(a) *Burden of proof.* The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) *Eligibility.* The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this

section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) *Discretionary referral or denial.* Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) *Burden of proof.* In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

Appendix E

(iii) *Grant in the absence of well-founded fear of persecution.* An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) *Well-founded fear of persecution.* (i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by

relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender,

health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(c) *Mandatory denials—(1) Applications filed on or after April 1, 1997.* For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section 208(a)(2) or 208(b)(2) of the Act applies to the applicant. If the applicant is found to be ineligible for asylum under either section 208(a)(2) or 208(b)(2) of the Act, the applicant shall be considered for eligibility for withholding of removal under section 241(b)(3) of the Act. The applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.

Appendix E

(2) *Applications filed before April 1, 1997.* (i) An immigration judge or asylum officer shall not grant asylum to any applicant who filed his or her application before April 1, 1997, if the alien:

(A) Having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community;

(B) Has been firmly resettled within the meaning of § 1208.15;

(C) Can reasonably be regarded as a danger to the security of the United States;

(D) Has been convicted of an aggravated felony, as defined in section 101(a)(43) of the Act; or

(E) Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

(ii) If the evidence indicates that one of the above grounds apply to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act.

(F) Is described within section 212(a)(3)(B)(i)(I), (II), and (III) of the Act as it existed prior to April 1, 1997, and as amended by the Anti-terrorist and Effective Death Penalty

Appendix E

Act of 1996 (AEDPA), unless it is determined that there are no reasonable grounds to believe that the individual is a danger to the security of the United States.